FILED
MAR 18 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 657

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

versus

RILLA MAE FREEMAN, ADMINISTRATRIX OF THE ESTATE OF MURPHY HILL FREEMAN, DECEASED,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PEYTON D. BIBB,
Counsel for Petitioner.

CHARLES COOK HOWELL,
Wilmington, North Carolina.

JOHN S. FOSTER,
GRAHAM, BIBB, WINGO & FOSTER,
Of Counsel.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Jurisdiction	1
Statement of the matter involved	2
Questions presented	7
Reasons for allowance of the writ	8
Prayer for writ	9
Brief in support of petition	10
Opinion below	10
Jurisdiction	10
Statement of the case	10
Questions presented	10
The statute involved	11
Argument	11
Summary of argument	11
Conclusion	19
Appendix:	
Exhibit A—Code of Alabama of 1940, Section 170, Title 48	20
Exhibit B—Opinion of Supreme Court of Alabama in case of *Atlantic Coast Line* v. *Bargainer*	21

Table of Cases Cited

Atlantic Coast Line v. *Barganier* (decided by Supreme Court of Alabama January 3, 1952 and printed herein as exhibit B)	18
Atlantic Coast Line v. *Robins*, 192 F. 2d 657	19
Carter v. *Pennsylvania R. Co.*, 172 F. 2d 521	13
Fayet v. *St. Louis & S. F. R. Co.*, 203 Ala. 3, 81 So. 671	13
Hines v. *Cooper*, 205 Ala. 70, 88 So. 133	19
Louisiana & Arkansas Ry. v. *Jackson*, 95 F. 2d 369	13

Page

Loisville and Nashville R. Co. v. *Griffin*, 240 Ala. 213, 198 So. 345 16
Pollard v. *Davis*, 93 F. 2d 193 13
Roberts v. *Louisville & Nashville R. Co.*, 237 Ala. 267, 186 So. 457 19
Rothrock v. *Alabama Great Southern R. Co.*, 201 Ala. 308, 78 So. 84 18

STATUTES CITED

Alabama Code of 1940, Section 170 of Title 48 ..... 4, 11
28 USCA Sec. 1254(1) 1, 10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 657

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

versus

RILLA MAE FREEMAN, ADMINISTRATRIX OF THE ESTATE OF MURPHY HILL FREEMAN, DECEASED,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Atlantic Coast Line Railroad Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on the 14th day of December, 1951, which affirmed a judgment of the United States District Court, for the Northern District of Alabama in favor of the Respondent and against your Petitioner.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 USCA, Sec. 1254 (1).

The opinion of the Court of Appeals for the Fifth Circuit was filed December 14, 1951. Petition for rehearing was denied January 18, 1952 (R. 244).

Statement of the Matter Involved

The decedent, Murphy Hill Freeman, died as the result of a collision between an automobile, in which he was riding as a passenger, and a passenger train of Petitioner at a public road crossing. The Respondent, as his Administratrix, brought suit alleging his death to have been wrongfully caused by negligence of Petitioner's employees operating its train. At the conclusion of all the evidence in the United States District Court, the Petitioner (Defendant) duly moved the District Court to direct a verdict of the jury in its favor (R. 167) which motion taken under advisement, the cause was submitted to the jury, which returned a verdict for Respondent (Plaintiff). Petitioner's motion for directed verdict and for new trial was overruled (R. 193). The Court of Appeals for the Fifth Circuit, affirmed (R. 203).

The physical facts and surroundings of the crossing are material. These surroundings were in part shown by photographs, the originals of which were certified to the Court of Appeals separately from the printed record. While these photographs may be available to this Court, as requested by Petitioner, to avoid any confusion, we adopt the statements of the Court of Appeals regarding such physical aspects and surroundings as set out in the second and third paragraphs of its opinion as follows (R. 203-204):

> "The collision occurred about 8:22 a. m. on January 14, 1950, a foggy, misty morning, with light drizzling rain, where appellant's single main line track intersects a state highway at right angles near Powderly, Alabama, just outside the southerly city limits of

Birmingham. The train was about 10 minutes behind schedule. The crossing is in semi-rural territory, but near several populous areas. The highway, which connects the towns of Midfield and Fairfield, is paved 21 feet wide and carries reasonably heavy traffic. At the crossing, there is a conventional crossarm crossing sign, plainly visible to a car approaching from the north, but no other protective devices.

"The automobile in which deceased was riding approached the crossing from the north, traveling south at a speed of 25 to 35 miles per hour. The train approached from the east, or left side of the automobile, at a speed of about 45 miles per hour. As it approached the crossing, the automobile did not reduce its speed. Although the engineer testified he applied the emergency brakes as soon as he discovered the oncoming automobile, the train's speed was reduced very little before the collision. The automobile had almost cleared the crossing when it was struck on its left rear by the left pilot step on the front of the locomotive. After striking the automobile, the engine became uncoupled from the cars, apparently as a result of the impact, and traveled about 600 feet beyond the crossing before stopping.

"The approaches to the crossing of both highway and railroad were straight. To one looking straight ahead down the highway, or straight down the railroad track, there is a clear view of the crossing itself from a substantial distance away. From the east, however, the railroad track approaches the crossing through a shallow 'cut', on the sides of which are low banks. On top of these banks, and in the area to the north and east of the crossing, there were trees and rather dense weeds and other growth, so that an automobile driver approaching the crossing from the north would not have a clear view of a train approaching from the east, nor would the engineer of the train have a clear view of the approaching automobile, until train and automobile were quite close to the crossing. Even in winter, with foliage greatly reduced, the trunks of the trees

and the stems of thickly grown weeds and bushes obscure the view to the northeast of the crossing, across which area the engineer and driver of the car would have to look in order to see each other a substantial distance back from the crossing."

Section 170 of Title 48, Alabama Code of 1940, required that the engineer blow the whistle *or* ring the bell for at least one-fourth of a mile before reaching this public crossing. The engineer testified that when he reached the whistle post (shown by actual measurement to have been 1334 feet five inches from the crossing (R. 156)) he commenced blowing the regular crossing signal with the whistle, which consisted of two long blasts of the whistle, one short blast and a final and fourth long blast of the whistle to be continued until the crossing was reached (R. 136), and that he also set the bell on automatic ringer at the same place and that it continued to ring until after the train passed the crossing. The giving of these customary and required signals was corroborated by the flagman (R. 127), the brakeman (R. 97), the conductor (R. 116). In addition a passerby, one Penney, a witness for the appellee, testified he was walking along beside the track in the direction from which the train was coming, was familiar with the regular type of crossing blasts of the whistle, and that positively the whistle was blown for a quarter of a mile before reaching the crossing (R. 47-51). Also one Neale, a witness for the Petitioner (Defendant), testified that he was familiar with the road and crossing of the tracks in question, that at the time he was approaching this crossing about two blocks away, was thoroughly familiar with the type of crossing signal blown for public crossings, and that he heard the several long and short loud blasts of the whistle of Petitioner's train as it approached that crossing, immediately before the accident happened (R. 90-92).

There were only two other witnesses who mentioned the whistle in any way whatever.

One Foster, a witness for the Respondent (Plaintiff) testified that he was driving his automobile along the road immediately behind and going in the same direction as the automobile in which the decedent Freeman was riding, at a speed of about twenty-five to thirty miles per hour (R. 28); that when he was about one hundred to one hundred fifty feet from the crossing he became conscious of the approach of the train by hearing its whistle blowing loudly (R. 34). That at the time he first heard and then saw the train, the engine was approximately two hundred feet from the crossing (R. 30-31) and that the whistle continued to blow long and loud until the engine reached the crossing; that the car ahead of him in which Freeman was riding continued on to the crossing without stopping and the rear of the automobile was struck by the engine (R. 30-36). That he pulled off the road to the right and stopped before reaching the crossing (R. 36).

One Scales, a witness for the Respondent (Plaintiff), testified that he was approaching the crossing in question from the opposite direction from the approach of the automobile occupied by the decedent Freeman; that after he had topped a hill and had reached a point about two hundred feet from the crossing where he had a view of the crossing the collision between the automobile and the engine took place (R. 39); that he therefore did not see the automobile in which Freeman was riding before the collision (R. 60); that he did hear the train whistle at or maybe a little before the time the actual collision took place (R. 62); that before he reached the point where he could and did see the crossing and the accident in question, there had been a high hill in between him and the railroad track of the Petitioner, that he had also passed another railroad crossing on the highway and had driven along by a factory which was making a

hissing sound and was not paying any attention to any train on the Atlantic Coast Line Railroad track, and did not know whether the engine had blown any whistle prior to the time he came in sight of the track or not (R. 63). Concerning the extent of obscurity of vision between the engineer and the motorist approaching as was Freeman, Highway Patrolman Turner testified to actual measurements and demonstrations made the morning of the accident. With a locomotive stopped at a point two hundred feet from the crossing approaching in the direction from which the train in question approached, the trees and other vegetation along the railroad right of way and along the highway obstructed the view of the motorist approaching as was Freeman's automobile until it reached a point sixty-three feet from the railroad crossing (R. 111) at which point the said stopped locomotive could then be seen; approaching along the highway within sixty-three feet of the crossing, however, the view down the track became increasingly longer until at a point approximately twenty feet from the railroad track the view down the track in the direction from which the train was approaching was unlimited or unimpeded for approximately one mile (R. 113).

The engineer O'Neal further testified in regard to approaching the crossing with the bell ringing, and as he was engaged in blowing the fourth and final blast of the regular crossing whistle (R. 138, 139) and when he had reached a point about seventy-five to one hundred feet from the crossing he first discovered and saw the approaching automobile (R. 138); and that as quickly as it was humanly possible for him to do so he began sounding short alarm blasts with his left hand and with his right hand applied the brakes in emergency (R. 139); that there was nothing else that he could have done to have stopped or slowed the speed of the train (R. 143); the speed of the train was between forty-five and fifty miles per hour (R. 38).

The expert testimony on the application and functioning of air brakes such as were in use on the train in question, showed that on the average it requires two seconds of human reaction time on the part of the engineer in observing a condition requiring the application of brakes and actually putting them on (R. 161). Further that there is a mechanical reaction time of two seconds between the time the operator actually sets the brake in emergency and the time the brakes actually take effect throughout the train in emergency (R. 163) a total human and mechanical reaction time of four seconds between the time a situation requiring the application of brakes is observed by the operator and the time the brakes go into effect on the average.

The engineer further testified that in approaching the crossing on the occasion in question, the track was perfectly straight for over a quarter of a mile, that in approaching the last quarter of a mile, under the conditions of weather and otherwise then prevailing he had a clear view of the crossing itself, and was looking ahead at the crossing in approaching this last one-fourth of a mile and after passing the whistle post (R. 137); that he saw nothing on or approaching the track until he was about seventy-five to one hundred feet from the crossing, at which time the automobile occupied by Freeman came into his view at a point about fifty to seventy-five feet from the crossing (R. 138).

Questions Presented

1. In a suit involving a charge of negligence on the part of the engineer in control of a train in failing to give required warnings of approach to a public crossing and where six witnesses including the engineer and other three members of the train crew, and two other citizens in the immediate vicinity, testified positively and unequivocally

that such signals were given loudly and properly as the engine approached for one fourth of a mile of the crossing, whether the testimony of two persons driving automobiles nearby, and who were not listening, that they did not hear the train whistle until the engine was near crossing is sufficient to make a justiciable issue and conflict in the evidence as to the giving of the signals as the train approached the crossing.

2. In trial of a claim that the engineer of the defendant's railroad train in approaching a public crossing was guilty of negligence in failing to use all means at hand to avoid injuring the plaintiff after discovery of the plaintff in a position of peril whether actual knowledge of the plaintiff's peril on the part of the engineer, in time to have avoided the accident by the use of all means at hand, must be affirmatively shown by the evidence as a condition precedent to liability.

3. Whether there was sufficient evidence of either initial negligence or negligence after discovery of the decedent's peril (subsequent negligence) to warrant submission of the issues to the jury.

Reasons for Allowance of the Writ

1. With the record showing the positive and unequivocal testimony of six witnesses, the four members of the train crew and two citizens in immediate proximity, that the required signals of approach were given as the locomotive approached within one-fourth of a mile of the public crossing, the decision of the Court of Appeals that purely negative testimony of two persons driving vehicles near the crossing that they were not conscious of hearing the engine whistle until it was very near the crossing is sufficient to create a conflict in the evidence on a charge of negligent failure to give such signals is contrary to the decisions of the Supreme Court of Alabama, the decisions

of the United States Court of Appeals, Sixth Circuit and its own previous decisions on this important question of local law.

2. The decision of the Court of Appeals that actual knowledge of peril on the part of the defendant's employee, a basic element of liability for negligence after discovery of peril (known to Alabama law as "subsequent negligence"), may be inferred by a jury from the "circumstances" as distinguished from a requirement of probative facts disclosing such actual knowledge, is contrary to the opinions of the Supreme Court of Alabama.

A supporting brief accompanies this petition.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari issue to review the order of final judgment of the United States Court of Appeals for the Fifth Circuit entered by that Court in this case on December 14, 1951 (application for rehearing overruled January 18, 1952) and that said order of final judgment may be reversed by this Honorable Court, and the case be remanded to the United States District Court for the Northern District of Alabama with directions to enter a judgment in favor of your Petitioner, or if your Petitioner be mistaken in this, then for a new trial, and that your Petitioner may have such other and further relief as this Honorable Court may deem proper.

PEYTON D. BIBB,
Counsel for Petitioner.

CHARLES COOK HOWELL,
Wilmington, North Carolina.

JOHN S. FOSTER,
GRAHAM, BIBB, WINGO & FOSTER,
1115 First National Building,
Birmingham, Alabama,
Of Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the United States Court of Appeals, Fifth Circuit (R. 203) is reported in *Atlantic Coast Line Railroad Company* v. *Freeman*, C. C. A. 5th, 193 F. 2d 217.

II

Jurisdiction

The jurisdiction of this Court is invoked under Sec. 1254(1) of Title 28, United States Code. The judgment of the United States Court of Appeals, Fifth Circuit, to be reviewed was entered December 14, 1951 (R. 207). Application for rehearing was denied January 18, 1952 (R. 244).

III

Statement of the Case

A statement of the case appears in the petition for writ of certiorari under the heading "Statement of the Matter Involved". In the interest of brevity, that statement is not now repeated, but is referred to with request that it be considered as incorporated here by reference.

IV

Questions Presented

The questions specifically raised by the petition for writ of certiorari appear there under the heading "Questions Presented". Again in the interest of brevity, they are not now repeated but are referred to with request that they be considered as incorporated here by reference.

V

The Statute Involved

This suit was instituted to recover damages for the death of Respondent's decedent, Murphy Hill Freeman, which resulted from injuries sustained in a collision between an automobile in which he was riding and a passenger train of Petitioner at a public crossing in Jefferson County, Alabama.

The only statute of Alabama which bears on the issues here raised is Section 170, Title 48, Code of Alabama of 1940, a copy of which is set out in the Appendix hereto, and in the Record (R. 243).

VI

ARGUMENT

Summary of Argument

1. Where six witnesses testify positively and unequivocally that required signals of approach to a public crossing were given by the locomotive engineer, the testimony of two witnesses merely that they did not hear the whistle until just before the accident is insufficient to make a conflict and issue for the jury where such witnesses were either not listening or not in a position to hear.

2. Actual knowledge by the engineer of the plaintiff's position of peril at a railroad crossing in sufficient time to permit the engineer to avoid the accident by use of all means at hand is a condition precedent to liability as for "subsequent negligence" and must be affirmatively shown by the evidence.

3. The evidence was insufficient to show any negligence or subsequent negligence on the part of Petitioner (Defendant) as the proximate cause of the death of the decedent

Freeman; on the contrary, the evidence showed without material conflict that the action of the driver of the automobile in which he was riding was the sole proximate cause of his injury and death.

1. *The evidence was insufficient to make an issue for the jury on a question of alleged negligent failure of the engineer to sound the proper warning signals for the crossing.*

Even in the State courts of Alabama, which follow the scintilla rule, there was no dispute under the evidence here that the required warning signals were given for this crossing and no issue was made for the jury on that element.

Here the record shows positive and unequivocal testimony of the engineer (R. 136), flagman (R. 127), brakeman (R. 97), conductor (R. 116), a person walking beside the track near the crossing on the side of the train approach and facing it (R. 47-51) and a traveler on the highway close by the crossing (R. 90-92) that the required signals, with which all were familiar, were sounded long and loud as the engine approached within one-fourth of a mile of the crossing. As opposed to this overwhelming positive proof there is only the testimony of two witnesses merely that they did not hear or were not conscious of the whistle's blowing until the train was near to the crossing. On this rainy, raw January morning both were at the time steadily driving automobiles toward the crossing with engines running, neither of them testified that they were listening or paying any attention to the crossing or possible approach of a train, one was approaching from behind a high hill, passing a factory making a noise, and neither of them undertook to say that the whistle had not been sounded before they heard and became conscious of its blowing.

Under these circumstances, the fact that the required signals were given was established without dispute.

As illustrative of the settled principle of law in Alabama in this regard, attention is invited to the opinion of the Supreme Court of Alabama in *Fayet* v. *St. Louis & S. F. R. Co.*, 203 Ala. 3; 81 So. 671, wherein the Court aptly stated its application as follows:

> "Consideration of the evidence will show no conflict as to whether the bell of the engine was ringing while the train approached and reached the crossing. The plaintiff, his son, and his wife, as witnesses, testified only that they heard no bell. This was a probable fact in view of the plaintiff's own admission that he did not stop his automobile or cut off his engine before going near or on the track. The engineer and fireman in charge testified that the necessary and required signal was given at said time and place."

The United States Court of Appeals, Fifth Circuit, has itself so held heretofore. *Louisiana & Arkansas Ry.* v. *Jackson*, 95 F. 2d 369; *Pollard* v. *Davis*, 93 F. 2d 193.

The United States Circuit Court of Appeals, Sixth Circuit, has likewise followed and applied this obviously sound principle. In *Carter* v. *Pennsylvania R. Co.*, U. S. C. A. 6th, 172 Fed. 2d, 521, that Court aptly held:

> "There was substantial uncontradicted testimony that the statutory signals were given. Although an attempt was made to show the contrary, Appellant's evidence on this issue was merely to the effect that certain witnesses did not hear the whistle or the bell. *But such witnesses were not listening for the signals or were not in a position to hear, and would not say that the signals were not given. Such testimony was not sufficient to take the case to the jury".* (Emphasis supplied.)

It appears unnecessary to extend this discussion or citation further. It is submitted that these authorities abundantly demonstrate that the opinion and judgment of the

Court of Appeals that on this record there was any justiciable issue of negligence as for failure of the engineer to give the required crossing warning signals is contrary to the opinions of the Supreme Court of Alabama, the United States Court of Appeals, Sixth Circuit, and even contrary to the prior opinions of the United States Court of Appeals, Fifth Circuit.

The principle of local law involved is obviously of major importance in almost every railroad crossing accident.

2. *Actual knowledge by the engineer of the plaintiff's position of peril at a railroad crossing in time to permit the engineer to avoid the accident, by the use of all means at hand, is a condition precedent to liability as for "subsequent negligence", and must be affirmatively shown by the evidence.*

This vital element may not be made to depend upon conjecture or speculation.

Here the evidence was without dispute that because of trees and other growth in the area between the railroad right of way and the highway the view by the engineer of an automobile, approaching as was Freeman's, and the view by the motorist of the engine was each obstructed until both "train and automobile were quite close to the crossing".

The engineer, the only member of the crew who saw the decedent's automobile before the accident, testified that he was looking ahead at the crossing and giving the proper signals with bell and whistle during the last quarter mile of approach (R. 137) and that as the engine reached a position about 75 to 100 feet in his judgment from the crossing he first saw decedent's automobile approaching and, in his judgment about 50 to 75 feet from the track (R. 137-138); that when he first saw the automobile he was in the act of

giving the last regular whistle blow for the crossing (R. 139) and immediately and as quickly as he possibly could, he commenced blowing short sharp blasts of the whistle with his left hand and applied the brakes in emergency with his right hand (R. 139); and that there was nothing else he could have done to stop or slow the train (R. 143).

A State Highway Patrol Officer (R. 107) directed to the scene immediately after the accident occurred, testified to actual measurements and tests he made at the scene immediately after the accident. While he was doing so another train approached from the same direction as the train involved in the accident and stopped a measured distance of 200 feet before reaching the crossing (R. 111). In reference to the view and obstructions, he testified that traveling on the highway toward the crossing the train stopped ("up here behind the bushes") 200 feet from the crossing could be seen upon reaching a point 63 feet from the crossing (R. 111); that the closer the track was approached the more extended was the view down it until at a point 20 feet from the track the view was almost unlimited in the direction from which the train approached.

The witness Foster, who was driving his automobile immediately behind and following Freeman's automobile, testified that when he first saw the train it was, he judged, about 200 feet from the crossing with whistle blowing and Freeman's automobile was, he judged, about 50 feet from the crossing (R. 34; 36) and that the whistle continued to blow until the collision occurred.

In this posture of the evidence there was no dispute that the engineer used all means at hand to check the speed of the train and to stop it, simultaneously giving every warning he could, as soon as he became aware of the decedent's peril.

As illustrative of the well established principles of law applicable in Alabama, attention is invited to the decision of the Supreme Court of Alabama in Louisville and Nashville Railroad Company v. Griffin, 240 Ala. 213; 198 So. 345, wherein the elements of liability are very clearly stated as follows:

> "It is well established in this jurisdiction that in order to predicate liability for subsequent negligence, the defendant must be shown to have had actual knowledge of the plaintiff in a perilous position, and thereafter negligently fail to use all the means at his command and known to skillful engineers, so circumstanced, to avert damage to the plaintiff, when to have promptly and duly used such means could have averted the accident. * * *
>
> "The engineer must have actual knowledge of the obstruction however. *Such knowledge cannot be imputed to him because of circumstances from which the jury might infer that he had actual knowledge.*" Emphasis supplied.)

There was here not even a scintilla of evidence to dispute the unequivocal testimony of the engineer that as soon as he saw the decedent's automobile approaching the track at a driving speed he did everything he possibly could to slow or stop the train and further warn the driver. The testimony of Foster, the only other witness who saw the collision, corroborates the engineer.

True, the engineer estimates that his engine was about 75 or 100 feet from the crossing when he first saw the decedent's approaching automobile. It might be contended that there could be a reasonable inference from the testimony that the engine was farther from the crossing than 75 to 100 feet when the engineer saw the automobile. The maximum distance from the crossing any such inference would support is 200 feet under all the evidence and

physical facts. The train was travelling 45 miles per hour —approximately 66 feet per second. Under the undisputed evidence, the train would have reached the point of impact before the average engineer could have gotten the brakes in effect. The testimony showed without dispute that in the application and effect of the regular type of train air brakes on that train there is a lapse of 2 seconds human reaction time and 2 seconds mechanical reaction time, a total of four seconds on the average, between the time the engineer commences to apply the brakes and the time they take effect in emergency.

Clearly and without dispute, had the engineer been the maximum possible distance from the crossing when he became aware of the automobile's approach without indication of stopping for the crossing, he could not have avoided the accident by the use of all available means.

Unusually apt upon the issues decided by the Court of Appeals in this case is the opinion of the Supreme Court of Alabama, rendered on January 3, 1952, in the case of Atlantic Coast Line Railroad Company, Appellant vs. Calvin F. Barganier, Appellee, not yet officially reported and now pending on Appellee's application for rehearing. The suit involved another accident which occurred at the identical crossing involved in this suit. Because of great similarity between the evidence and issues in the two cases, a copy of the opinion of the Supreme Court of Alabama in that case is set out in the Appendix hereto.

Aside from the fact that in that suit the driver of an automobile was the plaintiff, the evidence was in many material aspects either identical or very closely similar to the evidence here. We shall not extend this brief by quotation of or detailed comment on the facts recited therein, but respectfully invite the Court's attention to them. There the entire Alabama Court held there to be issues for the

jury either on failure to give the proper signals or on negligence after discovery of peril.

Clear it is that the decision of the Court of Appeals that on this record that "the jury might have inferred from the circumstances that" the engineer became aware of the decedent's peril in time to have avoided the accident and that he negligently failed to do so is contrary to the established law and indicated decisions of the Supreme Court of Alabama.

3. *The evidence was insufficient to show any negligence on the part of Petitioner as a proximate cause of decedent's death; the action of the driver of his automobile was the sole proximate cause.*

There was no element of negligence of any degree regarding the speed of the train in relation to this crossing, characterized by the Court of Appeals as "semi-rural" and carrying "reasonably heavy traffic." As aptly held by the Supreme Court of Alabama, in Atlantic Coast Line Railroad Company v. Barganier, MS, see Appendix:

> "Here the testimony relied on by the plaintiff to convict the trainmen of wantonness falls far short of showing that the crossing in question 'was a populous crossing,' nor does it show or tend to show that people were in the habit of crossing 'with great frequency' at that hour of day or that the train was being operated without signals of its approach."

See also to same effect, Rothrock v. Alabama Great Southern R. Co., 201 Ala. 308; 78 So. 84.

Under all the circumstances shown and under the clear principles exemplified in the authorities commented on above in this Argument, it readily appears that the Court of Appeals erred to the injury of Petitioner in holding that there was any justiciable issue for the jury as to

negligence on its part as the proximate cause of decedent's death.

On the contrary, the evidence clearly shows that the action of the driver of decedent's automobile was the sole proximate cause of the collision and his death. Roberts v. Louisville & Nashville R. Co., 237 Ala. 267; 186 So. 457; Hines v. Cooper, 205 Ala. 70; 88 So. 133; Atlantic Coast Line Railroad Co. v. Robins, CCA 5th, 192 F. 2d 657.

Conclusion

In conclusion, it is respectfully submitted:

1. That the decision of the Court of Appeals, Fifth Circuit, that there was any proximately causative negligence on the part of Petitioner is erroneous, is contrary to the opinions of the Supreme Court of Alabama, the United States Court of Appeals for the Sixth Circuit and its own prior opinions.

2. That a writ of certiorari should be granted and that this Court should review and reverse the decision of the Court of Appeals and remand the case to the United States District Court with directions to enter judgment for Petitioner, or, if Petitioner be mistaken in this, then to grant it a new trial.

Respectfully submitted,

PEYTON D. BIBB,
Counsel for Petitioner,
1115 First National Bldg.
Birmingham, Alabama.

CHARLES COOK HOWELL,
Wilmington, North Carolina.
JOHN S. FOSTER,
GRAHAM, BIBB, WINGO & FOSTER,
Birmingham, Alabama,
Of Counsel for Petitioner.

APPENDIX

Exhibit A

Section 170, Title 48, Code of Alabama of 1940:

170. (9952) (5473) (3440) (1144) (1699) (1399) Duty of engineer as to ringing bell and blowing whistle . . . The engineer or other person having control of the running of a locomotive on any railroad, must blow the whistle or ring the bell at least one-fourth of a mile before reaching any public road crossing, or any regular station or stopping place on such railroad, and continue to blow the whistle or ring the bell at short intervals, until it has passed such crossing, or reached such station or stopping place. He must also blow the whistle or ring the bell immediately before, and at the time of leaving such station or stopping place; and also immediately before entering any curve crossed by a public road, where he cannot see at least one-fourth of a mile ahead and must approach and pass such crossing at such speed as to prevent accident in the event of an obstruction at the crossing. He must also blow the whistle or ring the bell, at short intervals, on entering into, or while moving within or passing through any village, town or city. He must also, on perceiving any obstruction on the track, use all the means within his power, known to skillful engineers, such as applying brakes and reversing engine, in order to stop the train.

Exhibit B

Jan. 3, 1952.

The State of Alabama—Judicial Department

The Supreme Court of Alabama

October Term, 1951-52

6 Div. 167.

Atlantic Coast Line Railroad Co.,
a corp.,

v.

Calvin F. Bargainer

Appeal from Jefferson Circuit Court

Brown, Justice.

The plaintiff, appellee here, sued the appellant Atlantic Coast Line Railroad Company, a corporation, its engineer Watts and its conductor Smith in charge of and operating its freight train, in trespass on the case for injury to his person and property,—a Chevrolet 1936 Model automobile, —averring as inducement that while the plaintiff was driving said automobile on August 9th, 1948, "along a public highway, known as Midfield Road, which said public highway then and there crossed said railroad track at grade near Powderly, Alabama, the defendants ran said train against plaintiff's said automobile, and as a proximate consequence thereof plaintiff was injured and damaged as follows:

(End of Page 1 of the Opinion)

"His spinal column was broken and fractured; he suffered a concussion of the brain; he was injured internally; he was permanently injured, permanently scarred and permanently disfigured; his head, neck, shoulders, back, limbs, abdomen and other parts of his

body were cut, lacerated, bruised, contused and otherwise injured; the muscles and ligaments of his back, arms, abdomen and other parts of his body were sprained, strained, torn, ruptured, wounded and otherwise injured; his nervous system was greatly shocked and impaired, was permanently [illegible] and impaired; he was rendered unconscious for a long period of time; he was confined to the hospital, to his bed and to the house for a long period of time; he was caused to suffer great physical pain and great mental anguish; he was made sick, sore and ill for a long period of time; he was prevented from engaging in his customary employment for a long period of time, and was caused to lose the remuneration which he would otherwise have received therefor; he was rendered permanently less able to work and earn money, and his ability to work and earn money was greatly impaired; he was put to great trouble, great loss of time and great expense in and about procuring medical and hospital care, medicines, and medical supplies and services in and about an effort to heal and cure his said wounds and injuries; and the body, motor, chassis, wheels, tires and other parts of his said automobile were broken, bent, mashed, torn, twisted and otherwise damaged, and his said automobile was rendered less valuable.

(End of Page 2 of the Opinion)

"And plaintiff avers that all of his said injuries and damages were caused as a proximate result of the negligence of the defendants in and about the operation of said railroad train at said time and place."

The second count adopted the first count down to and including the cataloguing of damages claimed and averred that said injuries and damages were proximately caused by defendants' wanton conduct in running its said locomotive against the plaintiff's automobile on said crossing.

The defendants pleaded to both counts the general issue, in short by consent, with leave to offer in evidence any

fact or facts which if specifically pleaded would constitute a defense to the counts of the complaint or either of them.

While Mr. Bibb, counsel for the defendant, was making the closing argument for the defendant and about the time he was concluding said argument, the plaintiff offered an amendment to his complaint by striking Smith as a party defendant and by adding the following averments, as to the damages claimed:

> "'2. By adding at the beginning of the second paragraph of Count 1 thereof, the following words: "He was so injured about the body that his sexual capacity was impaired and he was rendered unable to engage in sexual intercourse; his bladder was injured and impaired, and his hearing was impaired."'"

(End of Page 3 of the Opinion)

As soon as the amendment embodying the claim above emphasized came to the attention of defendants' counsel, he objected to said added claim on grounds, among others, that it came too late; that it was not supported by the testimony of medical witnesses; that defendants were deprived of the right to cross-examine witnesses on said subject; that defendants were deprived of the right to offer countervailing evidence and to argue the same to the jury. The court overruled the objections and allowed said amendment and the defendants separately excepted. The record shows that said amendment was proposed after Mr. Foster, one of the defendants' counsel, had presented request for charging the jury in writing, that damages for loss of sexual capacity could not be awarded because the same were "special damages", not claimed.

The trial resulted in a verdict acquitting the engineer and assessing the damages in favor of the plaintiff against the railroad company for $60,000.00 followed by a judgment of the court on said verdict.

On the hearing of the motion for a new trial duly filed, the plaintiff, to avoid the granting of the motion, at the suggestion of the trial court filed a remittitur, reducing the amount of the damages to $42,500.00 and the motion for a new trial

was overruled. The defendant railroad company duly excepted.

One of the contested issues, left for the jury decision, was whether or not under the evidence the plaintiff observed the duty imposed on him by law to stop, look and listen before attempting to cross the railroad track. On that subject, in connection with the oral charge, the court gave the following special written charges:

(End of Page 4 of the Opinion)

"Charge No. 14. The Court charges the jury that one who is about to cross a railroad track must stop so near to the track and survey by sight and sound must so immediately precede his effort to cross over it as to preclude injection of an element of danger from an approaching train into the situation between the time he stopped, looked and listened and his attempt to proceed across the track.

"Charge No. 15. The Court charges the jury that under the law it is the duty of a person intending to cross a railroad track to stop, look and listen for approaching trains, and this use of the senses must be made within such nearness to the track and under such circumstances as will afford the traveller the knowledge whether or not he can cross the track with reasonable safety from collision with an approaching train. And the Court further charges you that this duty is a continuing one to the extent of excluding the injection of an element of danger in his attempt to cross between the time he last stopped, looked and listened, if he did so, and the time he entered the zone of danger made by trains entering the crossing.

"Charge No. 25. The Court charges the jury that a failure of the defendant's servants or agents to sound the whistle or ring the bell, if such were the fact, in approaching the crossing at which the collision complained of occurred did not relieve the plaintiff, Calvin F. Barganier, of the duty of stopping his vehicle and

looking and listening for approaching trains before attempting to cross the railroad tracks.

(End of Page 5 of the Opinion)

"Charge No. 29. The Court charges the jury that if you are reasonably satisfied from the evidence that there were obstructions which interfered with the plaintiff's view of the railroad track as he approached within one hundred feet of the railroad crossing on the occasion complained of, then it was the plaintiff's duty, in the exercise of reasonable care for his own safety, to stop and to look and to listen for approaching trains at a point where he could best see and hear an oncoming train before undertaking to cross the railroad track.

"Charge No. Y. I charge you gentlemen of the jury that before entering upon the crossing Mr. Barganier was under the duty of using reasonable care in listening to determine whether or not any train was approaching the crossing.

"Charge No. 20. The Court charges the jury that the engineer or other person in charge of the train approaching the public road crossing at which the collision complained of occurred was not required to blow the whistle continuously or to ring the bell continuously but that the duty imposed on him by law was that at short intervals commencing one-quarter of a mile before reaching the crossing either the whistle be blown or the bell be rung, one of the other."

(End of Page 6 of the Opinion)

The evidence shows that while plaintiff was driving his Chevrolet automobile on the Midfield Road leading from the old Bessemer Highway across to the new Super Bessemer Highway, proceeding in a northwesterly direction between six and seven o'clock on the morning of August 9, 1948, the defendant's locomotive pulling a freight train being operated by the defendant Watts collided with said automobile just as the front wheels of the automobile reached the northwestern rail of the single line railroad

track and threw the automobile to the northwestern side of the railroad against the cross-arm sign post standing on the northwestern corner of the intersection, causing said cross-arm to lean slightly to the northwest. The locomotive contacted the right rear wheel and fender of the automobile, wrecking the same and injuring plaintiff, who was caught and pinned in some way under the running board with his feet extending to the front part of the tonneau of the automobile.

No one saw the collision except the plaintiff, the fireman and the engineer operating the train and there was no other vehicle or person in sight of the crossing at the time of the collision. The fireman's testimony, which was without dispute, was that as the train approached the crossing, he was keeping such lookout ahead as was consistent with his duties to fire the engine with coal and supply the boiler with water by operating the injector, and just before the front of the locomotive reached the crossing he saw the automobile, to use his words, "flash upon the crossing out of nowhere" and he hollered to the engineer "car" and when he saw the automobile, it was entering on the crossing. The only other employee of the defendant railroad company in a position to observe the

(End of Page 7 of the Opinion)

incident was the front brakeman, who occupied a seat by the side of the fireman's seat. He testified that he was keeping a lookout and just about the time and immediately before the collision, steam from the boiler or spray of water from the injector which was being operated clouded his glasses, so that he could not see, and while in the act of removing his glasses to clear them from their clouded condition, the locomotive came in contact with the automobile. His testimony further goes to show that he was new on this run, was not familiar with the road and did not know that there was such a crossing as Midfield Crossing.

The engineer's testimony was to the effect that he had been engaged in operating as fireman and engineer on "that run for twenty-seven years" and "was familiar with

Midfield Crossing. That he started from Elyton, the terminus near Birmingham, one day and returned the next day. His testimony further goes to show, and it is not disputed, that he was sitting at the engineer's place in the cab of the locomotive on the right-hand side, and when the engine approached the crossing and was within two hundred feet thereof, the boiler and smoke stack obscured his view of the left rail of the tracks and the left side of the road crossing; that he did not see plaintiff's automomile until it was on the crossing and the front wheels of the automobile had reached the northwest rail of the railroad tracks. His testimony is further to the effect that the bell was ringing, operated by the automatic ringer from the time he left the terminus at Elyton until he reached the crossing; that he began to blow the crossing signal a quarter of a mile down from the crossing and was blowing the last blast of the crossing signal as the car flashed in his view; that he released the whistle and immediately

(End of Page 8 of the Opinion)

applied the brakes in emergency; that nothing else could be done by an engineer to slacken the speed or stop the train.

The train consisted of the locomotive, its tender, twenty-one cars and the caboose with eight wheels to each. The engine was working steam and was making the usual noise as it approached Midfield Crossing. The evidence further shows that the firebox had been freshly fired with eight or nine scoops of coal, causing the emission of black smoke from the smoke stack. The defendant's evidence further goes to show that the train was moving about 30 miles per hour and the noise of its approach was discernible. It was daylight and the weather was clear.

The undisputed evidence shows that the crossing was in the open country, not in a thickly populated district. The nearest habitation to the crossing, so far as the evidence shows, was the plaintiff's home, which was one-third mile or more from the crossing, and a filling station on the old Bessemer Highway at the Midfield Road intersection. There was no noise other than that of the plaintiff's auto-

mobile to distract plaintiff's attention or to obscure the noise made by the train.

Appellee himself testified as to his frequent use of this crossing over a long period of time. Plaintiff's witness Mr. J. R. Bunn, examined by plaintiff's counsel, testified in this regard as follows:

"Q. You were talking about the time you came along there. About the time of day you came along there, between six and seven o'clock in the morning what was the traffic; did it have much on it then or not much or little bit or a lot?

("After Mr. Bibb's objection was overruled and an exception reserved the witness answered):

"A. I imagine it had quite a bit of traffic, people going to work from there.

(End of page 9 of the Opinion)

"Q. I am not talking about what you imagined. I am talking about what you had observed; you had been through there before?

"A. Yes; I would say quite a bit crossing at those times.

"Q. Quite a bit of traffic on it at that time of day?

"A. Yes. * * *."

Plaintiff's witness Mr. J. M. Herring testified as follows:

"Q. Is that a much used, traveled highway out there?

"A. Yes, sir."

And the defendant's conductor C. B. Smith testified as follows:

"Q. You had been familiar with that crossing over the years you have worked on that line?

"A. Yes, sir.

"Q. And at that time in the morning with people going to work out there at the Tennessee Company it is a pretty populous crossing, is it not?

"A. It has been, yes, sir.

"Q. I say about that time of morning it has had much travel by automobiles over it?

"A. At times we have seen lots, and at times not any.

"Q. At that time in the morning it is usually a good many, isn't it?

"A. I don't know.

"Q. Isn't that about the time you usually pass there?

"A. I said at times you usually get few and at times many.

"Q. Sometimes you would pass it and not see a car?

"A. Yes, sir.

"Q. You knew from your many years of experience in passing over that crossing it was a popular crossing?

"A. Yes, sir.

"Q. And a hard surface crossing?

"A. Yes, sir."

(End of Page 10 of the Opinion)

In addition to the foregoing direct evidence on the point, the evidence showed that the crossing was used by several other people. Mr. Thomas M. Bailey testified that he had used the crossing at about 6:30 A. M. every day for seven or eight years. Mr. James Henry Burgess testified that he had been using the crossing off and on for about three or four months and on this particular day he went across the crossing about 6:25 or 6:30 A. M. on his way to work. Miss Mildred Farmer had used the crossing going backwards and forward to work every day for about six years. Mr. J. L. Thomas had used the crossing off and on since 1925. Mr. C. W. Buffington had used the crossing for as long back as he could remember (he was 36 yrs. old) and for a long time he had crossed it every day. Mr. Jessie Moore had lived at Grasselli for 27 yrs. and had used the crossing lots of times. Sometimes he used it once a week and sometimes every day during the week. Mr. W. J. Leighton, an insurance agent, had used the crossing in working his debit three or four times a week for about two and one-half years. Mr. J. S. Pitts had used the crossing twice a day for a good long time prior to the accident.

The evidence further showed that the engineer Mr. Watts had been running on that line either as an engineer or a fireman for 27 years.

The evidence further showed that just off of and to the right of the Midfield Road, on which plaintiff approached the crossing commencing from 400 to 500 feet of the crossing, a bank covered with growing weeds and bushes and extending up to the right-of-way, tended to obscure or lessen visibility to the east, the direction from which the train approached the crossing, a condition observed by and known to the plaintiff. Plaintiff testified as a witness in his own behalf as follows:

(End of Page 11 of the Opinion)

"Q. Now, Mr. Bargainer, back in the summer of 1948 in traveling from your home out to the place of your employment with the Tennessee Company, did you customarily use what is known as the Midfield Road?

"A. Yes, sir.

"Q. How often did you travel that road, Mr. Bargainer?

"A. As much as twice a day or more.

"Q. How long had you been traveling the road with that regularity?

"A. Possibly three years or a little over.

"Q. Where is your place of work with the Tennessee Company, at that time?

"A. Fairfield.

"Q. Are you familiar with the place where the Atlantic Coast Line track crosses the Midfield Road between the old Bessemer Highway and the Super Highway?

"A. Yes, sir.

"Q. Is that in Jefferson County, Alabama?

"A. Yes, sir.

"Q. Now, Mr. Bargainer, on the date—by the way, you are the man who received the injuries out there on August 9, 1948, aren't you?

"A. Yes, sir; I can vouch for that.

"Q. Were you driving the automobile you were in?

"A. Yes, sir.

"Q. What kind of car was that, Mr. Bargainer?
"A. 1936 Standard Chevrolet two-door.
"Q. 1936?
"A. Yes, sir.

(End of Page 12 of the Opinion)

"Q. In going from where you lived out towards Fairfield plant, where you worked, did you travel from the old Bessemer Highway toward the Super Highway?
"A. Yes, sir.
"Q. On the date when this accident happened were you traveling in that same direction from the old Bessemer Highway toward the new Super Highway?
"A. Yes, sir.
"Q. Is that road there a hard surface road, a black top road, Midfield Road?
"A. Black top.
"Q. Black top, and it was black top at that time?
"A. Yes, sir.
"Q. About what time of day, Mr. Bargainer, the best you can tell us, would you say this accident happened?
"A. It was sometime between 6:05 or 10 and 6:20 in the morning.
"Q. You would say near 6:15?
"A. Yes, sir; because my habit of leaving the house was around 6:05 or 6:10.
"Q. How far did you live from the crossing?
"A. The way I had to go it was approximately one-third of a mile, I guess, or a little further.
"Q. Now, Mr. Bargainer, on this occasion, where did you get on Midfield Road?
"A. I would say it was toward Birmingham from my house. I turned to the left at Pierce's Filling Station.

(End of Page 13 of the Opinion)

"Q. What distance had you been on the road before you reached the crossing—maybe I can get at it that way—to come off of the old Bessemer Highway onto the road?

"A. Yes; I came onto the road.

"Q. Yes, sir; that was what I was trying to get at.

"Now, Mr. Bargainer, as you approached this particular crossing that we are talking about, I wish you would tell these gentlemen here, if you will, about what speed you were operating your automobile back, I will say, within four or 500 feet of the crossing as you approached the crossing, but before you arrived at it, about what speed were you driving?

"A. Four or 500 feet back from the crossing?

"Q. Yes, sir.

"A. I wasn't traveling over 10—between 10 and 15 miles an hour 500 feet back from the crossing, if that fast. I hadn't been over 20 miles an hour when I left home.

"Q. Did you stop your automobile before you proceeded on across?

"A. Yes, sir.

"Q. Did you bring your car to a dead stop?

"A. Yes, sir.

"Q. Did you listen?

"A. Yes, sir.

"Q. Did you look?

"A. Yes, sir.

"Q. Did you look in both directions?

"A. Yes, sir.

(End of Page 14 of the Opinion)

"Q. In what position did you stop the front of your car—I will say the front bumper of your car, in what position did you stop that front bumper with reference to the nearest rail to you?

"A. I would say within three or four feet of the first rail, the rail nearest to me.

"Q. At that time did you look up the track to your right?

"A. Yes, sir.

"Q. How far could you see the track in that direction, Mr. Bargainer?

"Mr. Bibb: We object to that question as to how far he could see the track in that direction.

"The Court: You can ask him how far he saw it.

"Q. How far did you see the track in that direction?

"A. Less than 50 feet.

"Q. Was there anything between you and a point 100 feet up that track?

"A. Yes, sir.

"Q. All right. What was it?

"A. A bank, bushes, shrubbery and grass.

"Q. When you stopped and looked, did you see any train approaching from that direction?

"A. No, sir.

"Q. Did you hear any train approaching from that direction?

"A. No, sir.

"Q. Did you hear any bell ringing?

"A. No, sir.

"Q. Did you hear any whistle blowing?

"A. No, sir.

(End of Page 15 of the Opinion)

"Q. Did you hear any locomotive working or making a noise?

"A. No, sir.

"Q. Well, after you stopped and looked and listened, what did you do then?

"A. I proceeded across the crossing.

"Q. Did you put your car in high gear?

"A. No, sir; I put it in low gear as I crossed the crossing, looking both ways, one at a time and then the other.

"Q. You were looking back and forth both ways?

"A. That is right, as I was easing on the crossing.

"Q. Easing on the crossing?

"A. Yes, sir; because it was rough.

"Q. Did you observe the train which later struck you at any time before it struck you?

"A. Yes, sir.

"Q. Where was the train when you observed it?

"A. It was approximately 250 or 300 feet from where I was sitting.

"Q. Where was the front of your automobile when you observed it?

"A. I would say the front wheels were within 18 inches of the far rail.

"Q. Was there anything between the position you were in and the train until you got within 18 inches of the far rail; if there was, what was it?

"A. It was that bank and shrubbery was in my way until my front wheels crossed the rail.

"Q. All right, sir. How long have you been driving cars, Mr. Bargainer, automobiles?

"A. Approximately 35 years.

(End of Page 16 of the Opinion)

"Q. What speed, in your judgment, were you making from the time you started up and eased out on that track until you saw the train?

"A. When I first started off I would say I wasn't going over three or four miles an hour, but I imagine when I seen that train whatever it would do in just a few minutes in low is what it did.

"Q. I was going to ask you about that.

"A. Which is approximately 10—9 or 10 miles an hour.

"Q. Your judgment is you were making nine or ten miles an hour when the train——

"A. When I was struck.

"Q. ——when the train struck you? When you observed the train, what did you do?

"A. I pushed on the accelerator to try to get out of the way.

"Q. And at that time you say in your judgment the front wheels were within 18 inches of the far rail?

"A. Within 18 inches of the far rail.

"Q. In other words, it was across the first rail, and lacked just that much being to the second rail?

"A. Lacked that much being to the second rail.

"Q. In your judgment, Mr. Bargainer, what speed was the train making?

"A. I would say it was making between 45 and 50 miles per hour.

"Q. Did the train hit your car in front of where you were sitting, even with you, or behind where you were sitting?

"A. He hit behind where I was sitting. • • •."

(End of Page 17 of the Opinion)

The plaintiff further testified on cross-examination that his automobile was between sixteen and eighteen feet in length. Plaintiff's Exhibit "C" showing a picture of plaintiff's wrecked automobile after the wreck and showing the growth on each side of the railroad right-of-way indicates that the growth stands equal to or slightly above the step or running board of the automobile and that the width on each side of the right-of-way was about that of the automobile's length from the ends of the ties outward, giving a clear view of the railroad tracks as far as the eye can see. Defendants' Exhibits 1 and 2 illustrate the same condition.

Plaintiff's Exhibit "D," the hospital chart and history of his injury and treatment in the hospital, made in due course, contains the following: "This 44 yr. old white male was in an auto hit by a train about 6:30 A. M. The pt. remembers being on the R. R. tract (track) and seeing the train. He tried to speed up to get out of the way. The pt. was knocked unconscious and the next thing he knew he was in the ER (Emergency Room). • • •."—§ 415, Tit. 7, Code of 1940.

The appellee insists that the evidence presented a case for the jury under both counts of the complaint. To this we do not agree. Under repeated rulings here, the plaintiff's testimony that he stopped, looked and listened, in the face of the circumstances that if he had stopped, looked and listened he could have either heard or seen the train which was moving toward the crossing and near thereto when the plaintiff drove his automobile on the railroad track, does not constitute a conflict in the evidence, under the circumstances hereinafter stated. Peters v.

Southern R. Co., 135 Ala. 533, 33 So. 332; Southern Ry. Co. v. Irvin, 191 Ala. 622, 68 So. 139; Central of Georgia Ry. Co. et al. v. Graham, 218 Ala. 624, 119 So. 654.

(End of Page 18 of the Opinion)

The evidence is without dispute that the trainmen used all means at hand to check the speed of the train and to stop it as soon as they became aware of the plaintiff's peril. Louisville & N. R. Co. v. Sunday, 248 Ala. 597, 28 So. 2d 796.

The high bank along the right side of the highway, with the growth of weeds and bushes, imposed on the plaintiff the duty of using greater precautions to ascertain that he could proceed with safety, before driving his automobile on to the railroad track. Memphis & Charleston R. Co. v. Martin, 117 Ala. 367, 383, 23 So. 231; Highland Ave. & Belt R. Co. v. Sampson, 91 Ala. 560, 8 So. 778.

There is no doubt but what the train was moving toward the crossing and was near to it when the plaintiff drove up to the railroad tracks. The evidence further showed it was broad daylight and the train was making the usual noise and emitting black smoke and if the plaintiff had stopped, looked and listened in the space of the railroad right-of-way, he could have seen and heard the approaching train. To give credence to his testimony overtaxes judicial credulity. Peters v. Southern R. Co., 135 Ala. 533, 33 So. 332; Louisville & N. R. Co. v. Simmons, 251 Ala. 131, 36 So. 2d 460; Shelton v. Hacelip, 199 Ala. 535, 74 So. 950.

The doctrine holding trainmen and their employers liable to "by passers" for personal injuries and property damage proximately caused by their wantonness in handling railroad trains on their own tracks and rights-of-way is applicable alike to trespassers on the railroad track and those who are not trespassers, who merely exercise their right to cross the tracks in thickly populated districts, whether it

(End of Page 19 of the Opinion.

be an unguarded public road crossing, private crossing or in spaces between where no crossway is provided.

The court, dealing with the wanton count in Peters v. Southern Railway Co., 135 Ala. 533, 33 So. 332, observed:

> "It has been repeatedly held before one can be convicted of wantonness the facts must show that he was conscious of his conduct, and conscious from his knowledge of existing conditions that injury would likely or probably result from his conduct, and that with reckless indifference to consequences, he consciously and intentionally did some wrongful act, or omitted some known duty, which produced the injury. M. & C. R. R. Co. v. Martin, 117 Ala. 367; Benson v. L. & N. R. R. Co., 116 Ala. 198; Birmingham R. Co. v. Bowers, 110 Ala. 328; A. G. S. R. R. Co. v. Hall, 105 Ala. 599; Anniston Pipe Works Co. v. Dickey, 93 Ala. 418; and other cases might be cited. There was no evidence of knowledge on the part of defendant's engineer, or, as for that matter of any other person on the locomotive, of plaintiff's peril or presence on the track, or knowledge of existing conditions at the time and place of the accident, that injury would likely or probably result to the plaintiff or any one else from the speed at which the train was being run. The general charge for the defendant under the first count, we think, was properly given."

Simple negligence, "the inadvertent omission of duty," is not an element of wantonness. McNeil v. Munson S. S. Lines, 184 Ala. 420, 63 So. 992.

In Ga. Pacific Railway Co. v. Lee, 92 Ala. 262 (272), 9 So. 230, the court speaking through Justice McClellan observed:

> "* * * The doctrine is not based on the idea that they ought to have sooner observed the danger, however, but on the ground that they knew of its existence —of the presence of people in positions of peril, as a matter of fact, without seeing them at all in the particular instance. We fully

(End of Page 20 of the Opinion)

subscribe to this doctrine, but deny its application in the case at bar. Some of the evidence went to show that this train was running at from fifteen to twenty-five miles an hour, and that no signals were being given. But, conceding that such a rate of speed and such absence of warnings might stand for recklessness and wantonness in approaching a crowded thoroughfare, the locality here involved is not shown by any tendency of the evidence to have been of that character. At most, it was the crossing of a considerably travelled public road over the railway, and there was nothing in the situation, assuming that it was well known to the trainmen, to justify the imputation to them of a consciousness that a natural or probable result of their conduct would be the infliction of injury to persons or property at that point. * * *."

And again in Nave v. Alabama Great Southern Railroad Co., 96 Ala. 264 (267-269), 11 So. 391, Justice Coleman speaking for the court said:

"The rule declared in Glass v. Memphis & Charleston Railroad Co., 94 Ala. 581, is as follows: 'One who is injured in consequence of being negligently on a railroad track can not recover, unless the railroad employees are guilty of such gross negligence or recklessness as amount to wantonness or an intention to inflict the injury; and that this wantonness and intention to do wrong can never be imputed to them, unless they actually know (not merely ought to know), the perilous position of the person on the track, and with such knowledge, fail to resort to every reasonable effort to avert disastrous consequences. And this doctrine applies as well to densely populated neighborhoods in the country, and to the streets of a city or town, as to the solitude of the plains or forest.'

(End of Page 21 of the Opinion)

"The rule is further stated in Geo. Pac. Railway Co. v. Lee, 92 Ala. 271, as follows: 'The failure to keep

a lookout, which it was the duty of defendant's employees to maintain, and which would sooner disclose the peril of the driver and plaintiff's wagon and team, even conceding that such would have been the case, was at the most mere negligence, inattention, inadvertence'; * * * that 'the purpose to accomplish a given result can not be imputed to mental conditions the very essence of which is the absence of all thought on the particular subject.'

"The proposition declared in the citation from the case of Glass v. Memphis & Charleston Railroad Co., that 'wantonness and intention to do wrong can never be imputed to them unless they actually know, not merely ought to know,'' must be taken in connection with, and as limited, in the case of Ga. Pac. Railway Co. v. Lee, 92 Ala. 271, to the effect, 'That to run a train at a high rate of speed, and without signals of approach, at a point where the trainmen have reason to believe there are persons in exposed positions on the track, as over an unguarded crossing in a populous district or a city, or where the public are wont to pass on the track with such frequency and in such numbers, facts known to those in charge of the train, as that they will be held to a knowledge of the probable consequences of maintaining great speed without warning, so as to impute to them reckless indifference in respect thereto, as would render their employer liable for injuries resulting therefrom, notwithstanding there was negligence on the part of those injured, and no fault on the part of the servants after seeing the danger. The doctrine is not based on the idea that they ought to have sooner observed the danger, but on the ground that they knew of its

(End of Page 22 of the Opinion)

existence, of the presence of people in positions of peril as a matter of fact, without seeing them at all in the particular instance.' ''

And again in Highland Ave. & Belt R. Co. v. Robbins, 124 Ala. 113 (117), 27 So. 422, the court observed:

> "This doctrine was again, and more recently, considered and approved in Haley v. Kansas C. M. & B. R. Co., 113 Ala. 640, where it was said: 'There is no reason why this doctrine does not apply as well to densely populated neighborhoods in the country, when the conditions exist * * * (to call it into exercise) as to cities, towns and villages. It is the likelihood of peril to the safety of passers-by, known to defendant's employees, that makes the duty, and not the place itself. Nave's and Lees cases, supra'; M. & C. R. Co. v. Martin, 117 Ala. 367."

This doctrine was reaffirmed and applied in Louisville & N. R. Co. v. Heidtmueller, 206 Ala. 29, 89 So. 191, on the authority of Highland Avenue & Belt Railroad Co. v. Robbins, supra, and the statement noted below in the opinion in Southern R. Co. v. Stewart, 179 Ala. 304, 60 So. 927, that such frequent use "must co-exist with the proximity of a populous city or village," was pronounced dictum. Chief Justice Anderson, the writer of the majority opinion in the Heidtmueller case, supra, after stating the substance of what the evidence showed, held that the neighborhood at the place of the catastrophe was not so populous and the use of the railroad tracks was not so constant and continuous as to charge the engineer with knowledge of the presence of persons on the railroad tracks in a place of peril, and held that the defendants were due the affirmative charge.

(End of Page 23 of the Opinion)

The statement of the doctrine relative to liability for wanton injury or damage in paragraph [1] of the opinion in the case of Central of Georgia R. Co. v. Pope, 221 Ala. 145, 127 So. 835, is quoted from the opinion in Georgia Pac. Railway Co. v. Lee, 92 Ala. 271, 9 So. 230, and there is nothing inconsistent or in conflict therein with the cases cited above.

In Northern Alabama Ry. Co. v. McGough, 209 Ala. 435 [436], 96 So. 569, the court speaking through Chief Justice Anderson observed:

> "This case went to the jury on the third or wanton count alone, and there was sufficient evidence to justify the submission to them and to support the verdict for the plaintiff under said count. True, the speed of the train alone at the point in question did not constitute wantonness, but when accompanied with evidence showing that the point of injury was a populous crossing, and that people were in the habit of crossing with great frequency at this time of year and hours of the day, and that the train was operated without signal or warning, there being proof from which the jury could infer that the enginemen were conscious of conditions and probable injury, the plaintiff made a case for the jury. * * *." [Emphasis supplied.]

The utterances quoted differentiates the case at bar from the McGough case. Here the testimony relied on by the plaintiff to convict the trainmen of wantonness falls far short of showing that the crossing in question "was a populous crossing", nor does it show or tend to show that people were in the habit of crossing "with great frequency" at that hour of the day or that the train was being operated without signals of its approach. In addition

(End of Page 24 of the Opinion)

to what we have heretofore stated, before the witness Dull reached the scene of the collision the train had been stopped, with the locomotive standing about one thousand feet from the crossing and the engineer had left his cab and walked back to the crossing and he and the conductor were trying to relieve the plaintiff when said witness drove up in his car. Several minutes later others came along, but not with "great frequency". It cannot be assumed that the learned Chief Justice and his associates used the word "populous" in a judicial opinion without comprehending the force of its

meaning. See Webster's New International Dic., 1946 Ed., p. 1921.

We are, therefore, of opinion that the trial court erred in refusing the defendant's affirmative charge as to the wanton count.

There is not a scintilla of evidence going to show that the fireman Davenport, the brakeman or conductor were guilty of negligence or wantonness and the effect of the verdict acquitting the engineer also acquitted the defendant of liability. Walker v. St. Louis-San Francisco Ry. Co., 214 Ala. 492, 108 So. 388; Southern Railway Co. v. Lockridge, 222 Ala. 15, 130 So. 557; Southeastern Greyhound Lines v. Callahan, 244 Ala. 449, 13 So. 2d 660; Waters v. Anthony, 54 So. 2d 589.

The statute requires railroad companies to set up cross-arms of warning at public crossings, notifying all desiring to cross to look out for trains, and also requires the engineer operating the train over a crossing to blow the whistle or ring the bell and to keep a lookout for persons traveling on the highway. The failure to comply with these statutes is simple negligence. The basis for the doctrine of "stop, look and listen" is rested upon the fact that the railroad company in the operation of its trains has the

(End of Page 25 of the Opinioin)

right-of-way over its tracks and a failure to stop, look and listen before entering upon a crossing is contributory negligence which bars a right of recovery for simple negligence.

Section 239, Title 7, Code of 1940, makes liberal provision for allowing amendments to the complaint in actions at law as a matter of right, but said section in its concluding sentence provides: "But the court shall have the right to refuse the allowance of any amendment to the complaint after the conclusion of the argument, when in its judgment the completion of the trial of the cause would be unreasonably delayed, or when in its judgment injustice would result." [Emphasis supplied.]

This sentence of the statute invests the trial court with broad discretion in allowing amendments, reviewable on

appeal for abuse, if the allowance is calculated to work injustice. The defendant had the right to rely on the settled trial practice that special damages not claimed (2 Mayfield's Digest, p. 1028, § 13), though some evidence of such damage is adduced, may be eliminated by requesting written instructions to the jury. Waters et al. v. Weintraub, 52 So. 2d 510. The effect of allowing the amendment of the complaint by claiming special damages for loss of sexual capacity just as counsel for defendant was closing the last argument to the jury was to deprive the defendant, not only of the right to offer countervailing evidence, but of the right to examine plaintiff's expert medical witnesses as to the claim for special damages and to argue the question to the jury. This is a part of due process and constituted reversible error.

For the errors noted above the judgment of the circuit court is reversed and the cause is remanded.

(End of Page 26 of the Opinion)

The Per Curiam opinion follows the dissenting opinion of Justice Thomas rather than the majority opinion written by Chief Justice Anderson in Walker v. St. Louis-San Francisco Ry. Co., 214 Ala. 492, 108 So. 388.

Reversed and remanded.

Livingston, C. J., Foster, Lawson, Simpson and Stakely, JJ., concur in the result, as stated in the Per Curiam opinion which follows.

Per Curiam.

We concur in the result reached by Judge Brown, but there are some features of his opinion which we cannot approve.

We agree that the affirmative charge should have been given for defendant on both the simple negligence and wanton counts for reasons which we will explain.

We think with the opinion of Judge Brown that as to the simple negligence count, the evidence shows without real conflict that plaintiff was negligent in respect to the stop, look and listen principle which proximately contributed to his injury, and therefore he cannot recover on that count.

Southern Ry. Co. v. Randle, 221 Ala. 435, 128 So. 894; Southern Ry. Co. v. Summers, 232 Ala. 417, 168 So. 179; Louisville & N. R. Co. v. Griffin, 240 Ala. 213, 198 So. 345; Atlantic Coast Line R. Co. et al. v. Flowers, 241 Ala. 446, 3 So. 2d 21.

But we cannot agree with all that is said in his opinion as to the wanton count. That count charged the proximate cause of the injury of plaintiff to be defendants' wanton conduct in running of its locomotive against plaintiff's automobile on said crossing. Judge Brown calls that count trespass on the case. We cannot agree with that theory. The wantonness is charged to the defendants,—all of them. It is not a charge to the servants or agents of the

(End of Page 27 of the Opinion)

railroad company for which it is responsible, which would be case as to it. But the charge is that defendant railroad company did the wanton act, as well as the defendant Watts. The liability of the railroad is not alleged to be dependent on the wantonness of Watts. They are sued as separate persons jointly and severally participating in the wanton act. That makes a trespass as to them both. City Delivery v. Henry, 139 Ala. 161, 34 So. 389; Birmingham Ry. Lt. & Pr. Co. v. Hayes, 153 Ala. 178 (8), 189, 44 So. 1032; Central of Georgia Ry. Co. v. Freeman, 140 Ala. 581, 37 So. 387; Bessemer Coal, Iron & Land Co. v. Doak, 152 Ala. 166, 44 So. 627; Ex parte Louisville & N. R. Co., 203 Ala. 328, 83 So. 52; Southern Ry. Co. v. Beaty, 212 Ala. 608, 103 So. 658; National Baking & Lunch Co. v. Wilson, 198 Ala. 90, 73 So. 436; Louisville & N. R. Co. v. Abernathy, 197 Ala. 512, 73 So. 103; W. E. Belcher Lumber Co. v. York, 245 Ala. 286, 17 So. 2d 281. Under that count a discharge of Watts does not acquit the railroad company. § 139, Title 7, Code; Waters et al. v. Anthony, 252 Ala. 244, 40 So. 2d 316.

The evidence does not show that the railroad company directed, authorized or ratified the act of its trainmen on that occasion or otherwise directly participated in the wanton injury. It is, therefore, entitled to the affirmative charge notwithstanding the Act of October 9, 1947, p. 513

[§ 138 (1), Title 7, Code of 1940, Pocket Part], which we are now holding does not change that principle, though it in terms undertakes to do so. See our case of Sibley v. Sibley, 6 Div. 158 [M. S.].

(End of Page 28 of the Opinion)

We do not wish to say however that we disagree with the conclusion that the evidence is not sufficient to support a claim of wantonness on that occasion by the trainmen of the railroad company.

We need not express an opinion as to the allowance of the amendment to the complaint. That question is not likely to arise on another trial.

(End of Page 29 of the Opinion)